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JOHN F. DAVIS,

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1966

No. 62

SAMUEL SPEVACK, *Petitioner,*

v.

SOLOMON A. KLEIN, *Respondent*

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE
OF NEW YORK

REPLY BRIEF FOR PETITIONER

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REPLY BRIEF FOR PETITIONER

The brief of an *amicus curiae*, the Association of the Bar of the City of New York, correctly states that our initial discussion of the reach of the Fifth Amendment does not consider the logical extensions of our position. We did not undertake such a discussion primarily because the invalidity of the state's action in this case seemed clear under the well settled construction of the Fifth Amendment. However, *amicus curiae*'s contention that reversal of the judgment below would establish a principle that, carried to its logical extreme, would gravely impair the operations of the government is incorrect. To demon-

strate this, it is necessary to sketch a rather fully developed theory of the Fifth Amendment in many of its ramifications—ramifications which are not presented by this case.

In our opening brief we argued first that disbarment should be regarded as incrimination within the meaning of the Fifth Amendment's prohibitions, or, more precisely, that disbarment is a sanction indistinguishable from those traditionally imposed in criminal proceedings. See Comment, *The Fifth Amendment and Quasi-Criminal Sanctions*, 35 Tulane L. Rev. 400 (1961). If we are correct in that contention then clearly the state may not impose upon an attorney an election between disbarment and relinquishment of his constitutional privilege, since that action would amount to an adjudication of criminal guilt solely upon the basis of invocation of the privilege. Second, we argued that, even if disbarment is not incrimination for purposes of the Fifth Amendment, it is nonetheless a penalty within the meaning of *Griffin v. California*, 380 U.S. 609, and no such penalty may be imposed by the courts for refusal to disclose information which is protected by the privilege. *Griffin v. California*, *supra*; *Malloy v. Hogan*, 378 U.S. 1, 8. Finally, we argued that the plain language of the Fifth Amendment prohibits the government, state and federal, from making a threat that deprives one of the opportunity to make a decision, in the "unfettered exercise of his own will," *Malloy v. Hogan*, 378 U.S. 1, 8, whether or not to respond to a governmental demand for information that is concededly protected by the privilege. Were it otherwise, he would unquestionably be *compelled* to testify against himself, under decisions of this Court which establish that the impermissible means of compulsion are not limited to physical brutality or the threat of imposition of those

sanctions traditionally associated with criminal proceedings. See *Miranda v. Arizona*, 384 U.S. 436; *Bram v. United States*, 168 U.S. 532, 547-8.

We believe that the above arguments require reversal of the judgment below. Still, we think it not inappropriate for the *amicus* to seek an elaboration of our position as to the scope of the privilege in its application to situations substantially different from the case at bar. Therefore, with the caveat that the validity of our position in this case does not depend upon the validity of our position regarding all the hypotheticals raised by the *amicus*, we outline in this reply brief our view as to the general classes of permissible and impermissible governmental action under the Fifth Amendment.

The inquiry here, of course, focuses not upon the use by the state of incriminatory information disclosed as a result of impermissible governmental conduct. But see *Garrity v. New Jersey*, No. 13, O.T. 1966. Rather, we are concerned here with what conduct the Fifth Amendment makes impermissible, that is, with what threats or promises the courts will prevent from being carried out if, as here, the person subjected to that conduct does not submit, but refuses to relinquish his privilege.

First, there is an area of governmental conduct so obviously not proscribed by the Fifth Amendment that it would hardly be worthy of mention were it not for the suggestion of the *amicus curiae* that its permissibility is questioned as a logical extension of our argument. Where an intrinsic and essential element of a person's function, whatever it may be, involves the furnishing of information, his refusal to do so, whether because of his reliance upon the privilege or otherwise, may properly subject him to being relieved of his responsibilities. Thus, a trustee who refuses to perform his duty to account or an attorney for a state agency who refuses to furnish

a legal opinion to that agency—in each instance in reliance upon the privilege against self-incrimination—may be removed from office even though he may not be made to disclose incriminating information.

A similar case would be that of a government employee who refuses to answer questions by his superior relating to the performance of his duties. Thus, we do not contend that a court clerk who refuses to answer a question by the court as to the whereabouts of court records in his custody or a national bank examiner who refuses to answer questions by the Comptroller of the Currency as to his procedures in preparing examination reports is insulated from discharge because the refusal is based upon the privilege. Dismissal in these cases is based not upon pleading the privilege against self-incrimination but rather upon the inability or unwillingness of the person involved to perform the very functions for which he has been employed.

Second, there is a class of instances in which a state may have an adequate basis for taking action against a person—i.e., imposing a sanction or withholding a benefit—independent of a refusal by that person to relinquish his privilege against self-incrimination. In these instances, the state is not precluded from taking that action merely because it has suggested to the person that his relinquishment of the privilege and cooperation with the state may dissuade it from doing so. Thus, a suggestion by a prosecuting attorney that he will move to dismiss one or more counts of a multi-count indictment or reduce a charge in the event that an indicated defendant enters a guilty plea does not necessarily make such a plea the product of compulsion, though in a particular case circumstances may lead to that conclusion. See, e.g., *Cortez v. United States*, 337 F. 2d 699 (9th Cir.), cert. denied,

381 U.S. 953; *Martin v. United States*, 256 F. 2d 345 (5th Cir.), *cert. denied*, 358 U.S. 921; *Crawford v. United States*, 219 F. 2d 207 (5th Cir. 1955). And if the defendant does not plead guilty the state is not precluded from prosecuting on all counts of such an indictment or on the original charge merely because the prosecuting attorney has suggested that a plea of guilty might influence prosecutorial discretion. But cf. *McClure v. Boles*, 233 F. Supp. 928 (N.D.W.Va.).

Similarly, if counsel for a judicial inquiry has evidence of misfeasance that will support the disbarment of an attorney, he should be able to advise the attorney that, if he gives testimony concerning matters of legitimate interest to the court, his cooperation will be taken into account in determining the severity of the sanction that may be imposed upon him. That factor might well influence the decision to relinquish the privilege. But, standing alone, it would not establish "compulsion" within the meaning of the Fifth Amendment, and if the attorney refuses to testify, the court may proceed to disbar him *on the basis of the independent evidence in its possession*.

Included within this class of cases is a subcategory in which a governmental refusal to take certain action (e.g., the grant of a license or the lease of government property) may properly be based upon the absence of sufficient information rather than upon the possession of affirmative evidence. Furthermore, in some carefully circumscribed instances, it may be appropriate to impose the obligation to furnish that information upon an applicant for a license or governmental benefit. Thus, an applicant for admission to the bar may be required to demonstrate that he is a person of good character, and, his refusal to answer certain relevant questions may make it difficult for him to make the necessary showing. If he

fails to do so, his application may properly be denied, not because he has pleaded the privilege against self-incrimination but because his good character has not been established. As we show below, however, he may not be denied the opportunity to make the necessary showing simply because he has invoked the privilege against self-incrimination.

Another example of this kind of case is furnished by *Blumenthal v. F.C.C.*, 318 F. 2d 276 (D.C. Cir.), cert. denied, 373 U.S. 951, which, for reasons given below, we believe to have been incorrectly decided. In that case, the Court of Appeals upheld the Federal Communications Commission, which had denied a radio operator's license to persons who had pleaded the privilege against self-incrimination. The same court had held, in the earlier case of *Borrow v. F.C.C.*, 285 F. 2d 666, cert. denied, 364 U.S. 892, that the Commission was authorized, by virtue of its power to prescribe the qualifications of station operators, to inquire into whether applicants had been members of the Communist Party or of groups which advocate the overthrow of the government. In response to such inquiries the petitioners in the *Blumenthal* case invoked the privilege against self-incrimination. The court held that while the free exercise of the privilege undoubtedly had been impaired by the Commission's action, the Commission could nonetheless validly refuse the license because it did not have sufficient information about the qualifications of the applicants to warrant a grant.¹

This description of governmental conduct that is permissible, although it takes place in a context that includes

¹ This case is analytically similar to the hypothetical question raised by *amicus curiae*, on page 18 of its brief, relating to driver's licenses.

the exercise of the privilege, helps to delineate the governmental conduct that constitutes impermissible compulsion under the Fifth Amendment:

First, there can be little doubt that no governmental action may be imposed for the purpose of punishing an individual for his invocation of the privilege, in light of the standard of *Malloy* and *Griffin* that one's silence in reliance upon the Fifth Amendment may not be penalized. If a sanction is imposed for the purpose of penalizing an individual for his reliance upon the privilege, then, without regard to the character of that sanction, it is necessarily punitive in nature and impermissible. Cf. *Noto v. United States*, 76 S. Ct. 255, 100 L. Ed. 1518 (Memorandum of Harlan, J.); *Noto v. United States*, 351 U.S. 902.

Second, the government may not impose sanctions or withhold benefits solely because of one's invocation of the privilege, whatever may be its purpose in doing so. Where the government's action is based not upon independent grounds but only upon the invocation of the privilege, that action necessarily involves drawing adverse inferences from such invocation, in violation of this Court's decisions in *Grunewald v. United States*, 353 U.S. 391, and *Slochower v. Board of Education*, 350 U.S. 551. See also *Board of Public Education v. Intille*, 401 Pa. 1, 163 A. 2d 420, *cert. denied*, 364 U.S. 910.

Third, while a state may prescribe non-arbitrary conditions for the receipt of some governmental benefit, or for grant of a license to carry on an occupation that is subject to regulation, it may not, by legislative fiat, declare that an obligation to cooperate with a regulatory authority by answering all questions that may be asked is a necessary part of that occupation when, in fact, it is not. The power to regulate the dispensation of bene-

fits does not include the power arbitrarily to require relinquishment of the privilege against self-incrimination, any more than of other rights protected by the Constitution. See, e.g., *Sherbert v. Verner*, 374 U.S. 398; *Steinberg v. United States*, 143 Ct. Cl. 1, 163 F. Supp. 590; see generally Reich, *The New Property*, 73 Yale L. J. 733 (1964).

Finally, as we have indicated above, there are limitations upon the government's action in those cases in which it may act or refuse to act on the basis of one's failure to meet a burden of proof. *Speiser v. Randall*, 357 U.S. 513. Since it is obvious that government action of this type does tend to inhibit the exercise of the privilege against self-incrimination, and also that there may be strong temptation to use the "no information" rationale as a cloak for drawing impermissible inferences of guilt, bad moral character, or other unfitness from the invocation of the privilege, this class of cases should be rigidly circumscribed. Thus, there must be adequate justification for placing the burden of proof upon the individual rather than the government. In this connection, the difference between the grant of an initial license and the imposition of a heavy sanction—as in the case of revoking a license long held—might be relevant, as might the practical difficulties faced by the government in securing independent information.

Even in those instances, however, in which the burden of proof may be imposed upon an applicant for a license or other benefit, the government may not prescribe as a matter of law that one's burden can be satisfied only if he provides information by his own sworn testimony, in the face of assertion of the privilege. This would amount to the adoption of an irrebuttable presumption that the testimony, if given, would be adverse and of sufficient

weight to overcome any favorable evidence that might be presented. As we have stated, no such presumption or inference may be drawn from the invocation of the privilege against self-incrimination. See *Griffin v. California*, *supra*; *Grunewald v. United States*, *supra*. Indeed, in *Boyd v. United States*, 116 U.S. 616, the Court held unconstitutional under the Fourth and Fifth Amendments a federal statute which created, in suits for forfeiture of property, an irrebuttable presumption that documents which were not produced would prove any allegations that the government contended they would prove.

We recognize, of course, that the existence of certain qualifications may be easier to establish than others in circumstances where the applicant's own testimony is unavailable. For example, good character will frequently be quite readily established even by an applicant who refuses to answer certain questions upon constitutional grounds. See *Konigsberg v. State Bar*, 353 U.S. 252, 366 U.S. 36, and *In re Anastaplo*, 366 U.S. 82, in which just such showings were made.² It is much harder to show that one has never been a member of a subversive organization without making a sworn denial. The principle is

² In the second *Konigsberg* case, 366 U.S. 36, the Court held that, while its first decision precluded the state from drawing any inference of bad character from a refusal to answer questions, the state could constitutionally deny petitioner admission to the bar for his refusal "to provide unprivileged answers to questions having a substantial relevance to his qualifications." *Id.*, at 44 (emphasis added). The Court found the petitioner's refusals, based solely on First and not Fifth Amendment grounds, see *id.*, at 38, to be unprivileged in that his First Amendment rights were outweighed by the state's interest. *Id.*, at 52. As we noted in our opening brief, at p. 88, n. 17, this Court has not adopted the view that the Fifth Amendment privilege may be removed by balancing it against other interests. Where the refusal to answer is based upon the Fifth Amendment, denial of a license may not be based upon that refusal. A determination must be made whether the other evidence available to the tribunal warrants the issuance of the license.

the same in both cases, however, in that the opportunity to meet one's burden of proof may not be denied merely because of his reliance upon the privilege. It is in this respect—the failure to provide that opportunity—that the decision in *Blumenthal* was in error. An agency may not refuse a hearing by asserting that the required showing may be made *only* by sworn testimony of the applicant, in the face of the applicant's assertion of the privilege against self-incrimination.³ That position is consistent only with the conclusion that a license is to be denied not because of insufficient information but merely because of assertion of the privilege.

The discussion above relates, of course, to the *amicus curiae's* concern about the logical extensions of our position as to the scope of the Fifth Amendment, and the bulk of the foregoing discussion is quite distant from the facts of this case. Thus, clearly we are not here concerned with the class of cases which provide the most difficult problems in this area—those cases in which the government may base its action upon failure of an individual to meet a burden of proof. Petitioner here met his burden of proof of qualification for admission to the bar over 40 years ago, and he has practiced under his

³ *Kimm v. Rosenberg*, 363 U.S. 405, is not to the contrary. There, petitioner had applied for suspension of a deportation order, under a federal statute authorizing the Attorney General to exercise his discretion to suspend deportation of persons in the class eligible under the statute. The Court, over the dissent of four of its members, interpreted the statute as making eligible only those aliens who were not members of the Communist Party and held that the applicant had the burden of proof of his eligibility. Petitioner offered no evidence as to his non-membership in the Party and refused, on Fifth Amendment grounds, to answer the question whether he was a member; and the Court held that assertion of the privilege did not relieve him of his burden of proof. Nothing in the Court's opinion indicates, however, that petitioner's burden could be met only by relinquishing the privilege, and the Court specifically noted that petitioner "offered no evidence" as to his non-membership. *Id.*, at 407.

license since that time. Even assuming that the state could constitutionally adopt a procedure by which attorneys of unblemished standing could be called before a special inquiry from time to time and given the burden of re-establishing their good character, either for no reason at all or for the reason that an active contingent fee practice is thought to raise the likelihood of unethical behavior, see Brief for Respondent, p. 5, no one has cited any statute or regulation which imposed any burden of proof upon petitioner in these proceedings. In the Judicial Inquiry, while the record indicates that the practice of that body is to call very active attorneys before it merely on the chance that some unethical practices might be found (R. 37), no charges were made against petitioner and he was not advised that he must prove or disprove anything in particular. And, in the disciplinary proceeding which resulted in the order of disbarment here at issue, the referee's report clearly establishes that the burden of proof as to all charges rested upon respondent Klein (the petitioner in that proceeding) and not upon petitioner (R. 62, 78).

Neither is this a case in which the state's action—disbarment—was based upon independent evidence of misconduct which was called to petitioner's attention in an effort to influence him to relinquish his privilege. The state did, of course, threaten disbarment in an effort to induce petitioner to relinquish his privilege, but the basis for that threat was not an independent ground for disciplinary action but rather the refusal to relinquish the privilege, itself. And, finally, we are not here faced with a situation in which one's decision to invoke the privilege makes him incapable of performing the duties of his employment, as in the frequently cited case of the trustee who refuses to account. To be sure, the Appellate Division in this case held that petitioner's reliance upon his

"absolute right to invoke his constitutional privilege against self-incrimination" amounted to a failure to fulfill his "inherent duty" to divulge all pertinent information necessary to show his character and fitness to remain a member of the Bar [R.84-5] but, as we have shown in our opening brief, at pp. 26-9, that "inherent duty" was asserted to be inherent only after the Judicial Inquiry found that the exercise of their state privilege against self-incrimination by attorneys called before the Inquiry forced the Inquiry's counsel to develop independent evidence of the facts. Thus, the Inquiry developed *Cohen v. Hurley*, 7 N.Y. 2d 488, 166 N.E. 2d 672, *aff'd*, 366 U.S. 117, as a test case, and that case negated the long-recognized position of the New York courts that the exercise of the privilege against self-incrimination "cannot be a breach of duty to the court." *In re Grace*, 282 N.Y. 428, 435, 26 N.E. 2d 963, 967. A duty that is not in fact an inherent part of the function of a lawyer—and over a century of experience shows that an obligation to give incriminating testimony is not an inherent part of a lawyer's responsibilities—cannot be presumed or declared to be so by a legislature or by a Court exercising administrative functions. (Cf. *United States v. Romano*, 382 U.S. 136; *Tot v. United States*, 319 U.S. 463.)

We do not question that an attorney has a general obligation to cooperate with bodies such as the Judicial Inquiry in uncovering unethical practices relating to the profession, but it is quite another matter to say that an essential, inherent part of the attorney's function is testifying in such proceedings, whether or not the purpose in calling him is a fishing expedition to uncover any infractions which he may have committed. Certainly the traditional applications of the ethical canons requiring candor and cooperation with the courts have not embraced situations such as the case at bar. See Drinker, Legal

Ethics, 59, 69-75 (1954); Wise, *Legal Ethics*, 171-190 (1966). We note that courts and commentators have distinguished the function of an attorney from that of a policeman in this regard, concluding that an attorney may not be disciplined for a refusal to testify based upon the privilege against self-incrimination, even though a policeman may be dismissed. See *In re Holland*, 377 Ill. 346, 36 N.E. 2d 543; Ratner, *Consequences of Exercising the Privilege Against Self-Incrimination*, 24 U. Chi. L. Rev. 472, 499-508 (1957). Whether or not a policeman's specific function of reporting to his superiors all information concerning illicit activity permits his dismissal for refusing to disclose such information in reliance upon the privilege, it is clear that the policeman's relationship to the department which employs him differs from the private attorney's relationship to the courts. See *Cammer v. United States*, 350 U.S. 399.

Thus, as we have shown, the state's action in disbarring petitioner does not fall within the categories of governmental conduct which are consistent with the guaranties of the privilege against self-incrimination. As we argued in our opening brief, at pp. 26-9, the record in this case and the proceedings in other cases which reached this Court concerning the Judicial Inquiry at issue here strongly indicate that the state's action was imposed for the purpose of punishing attorneys who claim the privilege. At the least, the record establishes that the action was based solely upon exercise of the privilege. In short, what the state did here was to threaten disbarment, based upon no grounds other than refusal to relinquish the privilege, as a means of compelling petitioner to disclose information which concededly was within the protection of the privilege.* When the threat failed to compel peti-

* We have dealt fully in our opening brief with the arguments of respondent and of amicus curiae, the Association of the Bar of the

tioner to relinquish his privilege, the state then carried out that threat. The position of the state was clear: "If he elects to invoke his constitutional privilege against self-incrimination . . . he cannot at the same time retain his privilege of membership at the bar [R. 85]." The position of the Constitution seems to us also to be clear: no one may be compelled by the state to incriminate himself, and no one may be penalized by the state for refusing to do so. The action of the state in disbarring petitioner is in violation of the guaranties of the Fifth Amendment, as protected against state action by the Fourteenth Amendment.

Respectfully submitted,

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City of New York, that the records demanded from petitioner were not protected by the privilege. The *amicus curiae* does not adopt respondent's curious position, contradictory of his own petition for disciplinary action against petitioner and of the record and opinions of the courts below, that the disbarment was based solely upon refusal to produce the records. We have dealt with that argument in our opening brief and in our reply to respondent's brief in opposition to the petition for certiorari.

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